

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Apr 11, 2024

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SARAH BETH L.,¹

Plaintiff,

vs.

MARTIN O'MALLEY,
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 4:21-cv-05038-RHW

**ORDER ADOPTING REPORT
AND RECOMMENDATION TO
DENY PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT
AND GRANT DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

ECF Nos. 17, 25, 30

Before the Court is the Report and Recommendation issued by Magistrate Judge Alexander C. Ekstrom, ECF No. 30, recommending Plaintiff's Motion for Summary Judgment, ECF No. 17, be denied and Defendant's Motion for Summary

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

² Pursuant to Federal Rule of Civil Procedure 25(d), Martin O'Malley, Commissioner of Social Security, is substituted as the named Defendant.

1 Judgment, ECF No. 25, be granted. Plaintiff filed objections to the Report and
2 Recommendation and Defendant responded. ECF Nos. 31, 32. The Court has
3 considered Plaintiff's objections and after reviewing the Report and
4 Recommendation, finds the Magistrate Judge's findings are correct. Therefore, the
5 Court adopts the Report and Recommendation in its entirety, albeit with the
6 following explanation.

7 *1. Law of the Case*

8 The Report and Recommendation properly concludes that the law of the case
9 doctrine bars precludes Plaintiff's challenges to the ALJ's assessment of the
10 medical opinions of James Vaughn, M.D., N.K. Marks, Ph.D., and Plaintiff's
11 subjective symptom complaints. ECF No. 30. The Ninth Circuit has held that the
12 law of the case doctrine is primarily concerned with efficiency, and "should not be
13 applied when the evidence on remand is substantially different, when the
14 controlling law has changed, or when applying the doctrine would be unjust." *See*
15 *Stacy v. Colvin*, 825 F.3d 563, 567 (9th Cir. 2016). On remand Plaintiff submitted
16 two new medical exhibits (treatment records from less than ten visits between 2017
17 and 2019) which did not render the evidence on remand "substantially different,"
18 nor suggest that applying the law of the case doctrine would be unjust. The ALJ
19 reasonably concluded that the newly submitted medical evidence was not highly
20 probative, but rather showed a lack of treatment, the failure to resume mental

1 health treatment, and the ability to engage in some work. *See* Tr. 703. Accordingly,
2 the Court overrules Plaintiff's objections to the evaluations of Dr. Vaughn, Dr.
3 Marks, and Plaintiff's subjective complaints.

4 *2. Phyllis Sanchez, Ph.D*

5 As to the opinion of Dr. Sanchez, Plaintiff contends the ALJ committed
6 legal error by failing to make "independent findings" specific to Dr. Sanchez. ECF
7 No. 31 at 8. However, the ALJ assigned the opinion little weight because it was
8 set forth in a checkbox form with almost no explanation and was based, not on
9 examination, but the properly discounted opinion of Dr. Marks and limited other
10 evidence. Tr. 703. The ALJ also found the opinion unpersuasive for the same
11 reasons as he found Dr. Marks' opinion. The record belies Plaintiff's contention
12 that the ALJ failed to make an independent assessment of Dr. Sanchez's opinion.
13 The ALJ did not error in this assessment where the opinion lacked support because
14 it relied substantially upon the opinion of Dr. Marks formed during an examination
15 where Plaintiff's lack of full effort was a concern. *See* 20 C.F.R. § 404.1527(c)(3);
16 Tr. 760.

17 *3. CeCilia Cooper, PhD.*

18 Plaintiff contends the Report and Recommendation "failed to account for
19 Plaintiff's arguments" as to the opinion of Dr. Cooper. The Report and
20 Recommendation's failure to discuss every argument made by Plaintiff does not

1 amount to error that suggests this Court should not accept the recommendation.

2 The Court need not address every argument; it needs only determine whether there
3 was sufficient factual basis to support one reason for discrediting the opinion.

4 Here, the ALJ found the Dr. Cooper's opinion partially consistent with the
5 RFC which included limitations on interpersonal contact, supervision, and
6 complexity of tasks. *See* Tr. 726. The ALJ concluded that Dr. Cooper's opinion,
7 including that Plaintiff would require excessive reminders, did not warrant change
8 to the RFC for a number of reasons. First, despite Plaintiff's disclosure of active
9 marijuana use three to four times daily, Dr. Cooper made no diagnosis or
10 conclusions about this reported usage or its effect on the assessment of mental
11 health limitations. As substance addiction disorder is clearly one of Plaintiff's
12 severe impairments, the ALJ reasonably concluded that this reflected poorly on the
13 thoroughness of Dr. Cooper's assessment. *See Hardwick v. Astrue*, 782 F. Supp. 2d
14 1170, 1179-80 (E.D. Wash. 2011) (holding that a doctor's failure to diagnose or
15 factor in evidence of the claimant's substance abuse constituted a specific and
16 legitimate reason for disregarding the opinion); *Roy v. Colvin*, No. 14-35162, 656
17 F. App'x 816, 818 (9th Cir. 2016) (holding that the ALJ properly rejected the
18 opinions of the claimant's therapists because they did not sufficiently account for
19 his drug abuse). The ALJ therefore provided the explanation the Court's remand
20 Order directed. Further undermining Dr. Cooper's evaluation was the use of vague

1 terminology and the lack of validity or effort testing even though Dr. Cooper had
2 reviewed Dr. Marks' evaluation which raised caution about Plaintiff's effort. The
3 ALJ committed no legal error in discounting Dr. Cooper's opinion and the Court
4 overrules Plaintiff's objection as it relates to the weight given to Dr. Cooper's
5 opinion.

6 *3. Chavez presumption*

7 Plaintiff contends the ALJ erred in failing to make new findings as to the
8 application of *Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1988). ECF No. 31 at
9 2. However, the ALJ did reconsider application of *Chavez* and concluded that the
10 record on remand "show[ed] nothing materially different from the evidence
11 previously presented." Tr. 702. Given Plaintiff's failure to demonstrate changed
12 circumstances on remand, the ALJ again concluded the *Chavez* presumption of
13 continuing non-disability applied. Tr. 702 (incorporating Tr. 721 by reference). As
14 the ALJ did not erroneously weigh the medical evidence, the Report and
15 Recommendation properly concludes the ALJ did not err by applying the *Chavez*
16 presumption.

17 *4. Step three*

18 Plaintiff reasserts the claim that the ALJ made "no step three findings
19 whatsoever," yet this ignores the ALJ's incorporation of step three findings by
20 reference. *See* Tr. 702 (incorporating Tr. 20). The ALJ concluded that there is no

1 evidence that Plaintiff's fibromyalgia meets or medically equals Listing 14.09D.

2 *Id.* Plaintiff's claim that the ALJ failed to specifically consider Listing 14.09D is
3 unsupported.

4 *5. Steps four and five*

5 Plaintiff also claims that the ALJ "made no step four/five findings," which
6 ignores the ALJ's incorporation of findings by reference. The ALJ did not fail to
7 follow the remand order by failing to call a vocational expert as the Court did not
8 order vocational expert testimony. The need for additional vocational testimony or
9 different findings at steps four and five hinged upon the ALJ's assessment of the
10 evidence on remand, which did not involve error, nor require additional testimony.

11 Plaintiff also claims she was denied due process, yet she failed to attend her
12 hearing on remand and therefore waived her right to testify. Tr. 702.

13 Accordingly, **IT IS HEREBY ORDERED:**

14 1. Plaintiff's objections, **ECF No. 31**, to the Report and
15 Recommendation are **OVERRULED**.

16 2. The Report and Recommendation, **ECF No. 30**, is **ADOPTED** in its
17 entirety.

18 3. Plaintiff's Motion For Summary Judgment, **ECF No. 17**, is **DENIED**.

19 4. Defendant's Motion, **ECF No. 25**, is **GRANTED**.

20 5. The District Court Executive shall update the docket sheet to reflect

1 the substitution of Martin O'Malley as Defendant.

2 The District Court Executive is directed to enter this Order, **ENTER**
3 **JUDGMENT** in favor of Defendant, forward copies to counsel and Magistrate
4 Judge Ekstrom, and **CLOSE THE FILE**.

5 DATED April 11, 2024.

6 *s/Robert H. Whaley*
7 ROBERT H. WHALEY
8 Senior United States District Judge
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